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CITATIONS

723701—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 672

SOEWAPADJI AND 218 ALIEN INDONESIAN SEAMEN SIMILARLY SITUATED, PETITIONERS

v.

I. F. WIXON, AS CUSTODIAN OF PETITIONERS IN THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 29–32) is reported at 157 F. 2d 289.

JURISDICTION

The judgment of the circuit court of appeals was entered September 13, 1946 (R. 33). The petition for a writ of certiorari was filed November 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether otherwise valid warrants for the deportation of certain Indonesian seamen who overstayed their visiting period in the United States are invalid because on their return to Indonesia they might be subjected to punishment on account of their desertion from Dutch ships and adherence to the Indonesian revolt.

STATUTE AND REGULATIONS INVOLVED

The Immigration Act of 1924 (May 26, 1924, c. 190, 43 Stat. 153), as amended, provides, in pertinent part, as follows:

> SEC. 3 (8 U. S. C. 203). When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, * * *.
>
> SEC. 14 (8 U. S. C. 214). Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19

and 20 of the Immigration Act of 1917. * * *

SEC. 15 (8 U. S. C. 215). The admission to the United States of an alien excepted from the class of immigrants by clause * * * (5), * * * of section 3, * * * shall be for such time and under such conditions as may be by regulations prescribed, * * * to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, maintain the status under which admitted, he will depart from the United States.

The pertinent Regulations prescribed under the foregoing provisions are as follows:

SEC. 120.2, 8 C. F. R., 1943 Cum. Supp.[1]

Bona fide alien seamen defined. As used in section 3 (5) of the Immigration Act of 1924 (43 Stat. 154; 8 U. S. C. 203), the term "bona fide alien seamen" means any alien who in good faith is signed on the articles of a vessel arriving at a port of the United States from any place outside thereof, employed in any capacity on board such vessel, and seeking to enter the United States temporarily solely in the pursuit of his calling as a seaman, with the intention of departing with the vessel or reshipping on board any other vessel for any foreign port or place.

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[1] This section was renumbered 120.2 in the 1943 Cumulative Supplement. The text appears in the original codification, 8 C. F. R. 7.2.

SEC. 120.21, 8 C. F. R., Supp. 1943.

Alien seamen seeking entry in pursuit of calling; when ordered detained; waiver of crew list visa. (a) Any alien who upon arrival establishes that he is a bona fide seaman as defined in § 120.2, is admissible as a nonimmigrant under section 3 (5) of the Immigration Act of 1924 and is not inadmissible under the other provisions of this part and of Part 175, may be temporarily admitted for such period of time as the examining immigrant inspector shall designate, not to exceed, however, the time the vessel on which the alien arrives remains in the United States and in no event to exceed 29 days, * * *

STATEMENT

Petitioners are alien Indonesians who came to the United States as seamen serving on Dutch and British vessels (R. 2, 3–4; Pet. 2). Upon arrival, they left the ships and refused to serve further on the asserted basis of their allegiance to the Indonesian revolt (R. 4; Pet. 2). Thereafter they were denied extensions of their temporary admissions (R. 5), and they were ordered to be deported (R. 4, 9–10).

On June 12, 1946, a petition for an order to show cause why a writ of habeas corpus should not issue was filed on behalf of petitioners in the District Court for the Northern District of California (R. 3–8). That petition asserted, *inter*

alia, (1) that the warrants of deportation and, consequently, petitioners' detention by respondent, were illegal and constituted an abuse of the Attorney General's discretion because " * * * to deport the said aliens at this time to the Netherlands East Indies would be a violation of human rights and cruel and unusual punishment, and a violation of the United States Constitution and of the fundamental principles of the American policy of giving political asylum to the members of a race struggling to establish their own form of government and to free themselves from colonial exploitation, in that if said aliens are disembarked in the Netherlands East Indies they will be arrested as disloyal and traitorous to the Netherlands Government and subjected to severe punishment and possible execution" (R. 4); and (2) that because of the unsettled conditions in Indonesia petitioners should be allowed to remain and make a living in the United States until the situation in the Dutch East Indies has cleared and the Indonesian Republican Movement is recognized (R. 5).

Respondent's return showed that petitioners were detained by him as District Director of the Immigration and Naturalization Service under warrants of deportation duly and regularly issued by the Attorney General of the United States after a proper hearing in the case of each petitioner (R. 9–10).

Thereupon, the district court denied the petition for a writ of habeas corpus and discharged the order to show cause (R. 11). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 29–33).

ARGUMENT

Petitioners apparently sought to enter the United States as non-immigrants under the provisions of Section 3 of the Immigration Act of 1924, *supra,* p. 2, applying to "(5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman." Section 15 of the Act, *supra,* p. 3, provides that the admission of an alien seaman shall be "for such time and under such conditions as may be by regulations prescribed * * * to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States. * * *" While the record does not clearly show the factual basis for the deportation orders, the opinion of the court below states: "The warrants showed that appellants were being deported [pursuant to Section 14 of the Immigration Act of 1924, *supra,* pp. 2–3] because, after due hearings, it has been found that some of them were, at the time of

entry, not entitled to enter the United States, and that the others had remained in the United States for a longer time than was permissible." (R. 31.) The statement that some of the petitioners were not entitled to enter was probably predicated on the terms of Section 120.2 of the immigration regulations, *supra,* p. 3, defining "bona fide alien seamen." However, since it is not material to our argument, we shall pass the question of the possible illegal entry of some of the petitioners and assume that all were entitled temporarily to enter the United States under the terms of Sections 3 and 15 of the 1924 Act and regulations promulgated thereunder and that the only question here relates to petitioners' deportability for having overstayed their leave.

I. Preliminarily, in respect of petitioners' assertions as to the consequences of their being returned to Indonesia, it should be stated that we have been informed by officials of the State Department that on June 21, 1946, they were advised by the Netherlands Embassy that the Indonesian seamen had received explicit assurance in writing from the Netherlands consul in San Francisco that upon their repatriation and arrival in the Netherlands East Indies they would be free to go wherever they wished, and that it was the consul's personal opinion that the men would not be subjected to any repressive action. In view of these assurances and the fact reported in the public press that the Indonesian revolt is in the process of

peaceful settlement, the claimed basis for relief here would appear to have been dissipated.

II. Even, however, on the basis of the allegations in the petition for habeas corpus, it is clear that petitioners are not entitled to the relief sought. Petitioners concede that the deportation hearings were "fair on their face" (Pet. 3; see also R. 31) and that, except for the unusual circumstances of the consequences of deportation in their cases, they would clearly be deportable for having overstayed the temporary visiting period allowed by the statute and regulations (Pet. 15, 18). See Section 120.21 of the Regulations, 8 C. F. R., *supra,* p. 4. Thus, petitioners, in effect, confess that the immigration laws provide for their deportation, but contend that such action in their cases would be an abuse of discretion because it would deny them a right of asylum and result in the imposition of a cruel and unusual punishment. However, since the immigration laws are quite specific that persons such as petitioners shall be deported (see Section 14 of the Act, *supra,* pp. 2–3) and make no allowance for circumstances such as those upon which they rely, it is obvious that the issuance of the warrants of deportation merely followed the legislative directive and cannot, therefore, constitute an abuse of discretion.

Petitioners' reliance upon the Constitution is of no avail. Their transitory presence in the United States for the limited purposes of their

calling and for a limited period of time did not give them any such degree of attachment to or claim upon the United States as to require the application of constitutional rights, privileges, and immunities to them. While it is true that constitutional protections inure to residents of the United States as well as to its citizens, they do not extend to persons who do not at least have lawful residence here. Certainly, aliens who are excluded from the United States or whose presence in the United States is merely the result of a transitory privilege which has been lawfully terminated do not have any such rights.[2] As this Court said in *Turner* v. *Williams*, 194 U. S. 279, 292:

> * * * It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to

[2] It should be noted that petitioners' reliance upon the concurring opinion of Mr. Justice Murphy in *Bridges* v. *Wixon*, 326 U. S. 135, 161, discussing Bridges' rights under the Bill of Rights, ignores the vital fact noted therein that Bridges (in contradistinction to petitioners) had become invested with such rights due to the fact that he had lawfully entered and resided in the United States for a long period of time.

> concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

Assuming, *arguendo,* however, that the protections of the Constitution do extend to petitioners, nevertheless the warrants of deportation do not violate any of them. While it may be, as petitioners assert, that they will be punished upon their return to Indonesia (but see p. 7, *supra*), that fact does not make the deportation itself a cruel and unusual punishment within the meaning of the Constitution. It is well established that "deportation, however harsh to the individual, is not punishment; it is a proceeding civil, and not criminal, in nature." *Bilokumsky* v. *Tod,* 263 U. S. 149, 154–155, 157; *United States ex rel. Zapp* v. *District Director of Immigration,* 120 F. 2d 762, 764 (C. C. A. 2). See also, e. g., *Costanzo* v. *Tillinghast,* 56 F. 2d 566, 567-568 (C. C. A. 1); *Kaichiro Sugimoto* v. *Nagle,* 38 F. 2d 207, 209 (C. C. A. 9).[3] In any case, exclusion from the

[3] The only reported decision to the contrary is *United States ex rel. Weinberg* v. *Schlotfeldt,* 26 F. Supp. 283 (N. D. Ill.), which petitioners cite. That decision, however, is patently erroneous and can only be explained by the fact that the trial judge was moved by the certainty of the treatment that awaited petitioner at Nazi hands in the event of deportation.

United States or deportation will probably result in hardship, and in many instances it may result in the most extreme hardship—economic, political, or otherwise—for the alien. However, it cannot be said that in excluding or deporting the alien the United States imposes any punishment. It merely exercises its plenary authority to determine who, when, and under what conditions aliens may be permitted to stay in the United States. See *Fong Yue Ting* v. *United States,* 149 U. S. 698; *United States ex rel. Hudak* v. *Uhl,* 20 F. Supp. 928 (N. D. N. Y.) Thus, it is wholly illogical to attribute responsibility to the United States for what may happen to the alien elsewhere by virtue of the exercise of this sovereign right of the United States.

As to petitioners' contention that deportation would deny them a right of asylum, the answer is clearly, as the court below noted (R. 32), that there is no such right. While the United States in the exercise of its plenary authority over immigration could, if it so desired, extend the privilege of asylum to aliens because of political repression elsewhere, to conclude that such aliens have an absolute right of asylum would be in derogation of the sovereignty of the United States. See analysis in *Ex parte Kurth,* 28 F. Supp. 258, 263-264 (S. D. Calif.); cf. *Glikas* v. *Tomlinson,* 49 F. Supp. 104, 108–109 (N. D. Ohio). In brief, the determination whether they should be given asy-

lum in the United States is essentially a political question and a burden which cannot be assumed by the courts or administrative officers. See *Glikas* v. *Tomlinson, supra.* Since Congress has not to date chosen to exercise its power to permit petitioners to stay in the United States, there is no alternative under our immigration laws but to effect their deportation.

CONCLUSION

For the foreging reasons, the judgment of the court below is clearly correct. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946